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Supreme Court, U.S.
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No. 10-768

In the
Supreme Court of the United States

AFTERMATH RECORDS (D/B/A AFTERMATH ENTERTAINMENT), INTERSCOPE RECORDS, UMG RECORDINGS, INC.,

Petitioners,

v.

F.B.T. PRODUCTIONS, LLC, EM2M, LLC,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF OF PETITIONERS

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CORPORATE DISCLOSURE STATEMENT

The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

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REPLY BRIEF OF PETITIONERS

Since the Petition was filed, this Court issued its decision in *Ortiz v. Jordan*, No. 09-737 (U.S. Jan. 24, 2011). In *Ortiz*, this Court held that a party may not "appeal an order denying summary judgment after a full trial on the merits[.]" *Ortiz*, slip op. at 2. The decision below held the opposite: "We may therefore review the district court's denial of summary judgment despite full trial on the merits." Pet. App. 8a. Respondents do not dispute that this holding is contrary to *Ortiz*.

Respondents nonetheless attempt to avoid a GVR or summary reversal based on the fanciful notion that the Ninth Circuit also rested its decision on an "entirely independent" alternative ground. BIO 1. For two reasons, no such independent ground exists.

First, respondents cannot escape the explicit language of the decision below, which repeatedly makes clear that the Ninth Circuit reviewed and reversed the denial of summary judgment, and only that ruling. *See* Pet. App. 2a, 6a, 7a, 8a, 15a.

Second, respondents' "alternative" ground is entirely illusory. Respondents contend that "otherwise preserved issues of law . . . may be raised on appeal from a final judgment without regard to whether a JMOL [motion] was made at trial." BIO 13. But the key phrase is "otherwise preserved," and respondents do not contend that they "otherwise preserved" their argument *apart from their summary judgment motion*. What respondents now seem to be contending is that they were not so much appealing the denial of their summary judgment motion as pursuing an argument on appeal

"preserved" in their unsuccessful summary judgment motion. That is frivolous. This Court did not clarify the non-appealability of summary judgment denials in *Ortiz* only to allow appeals based on unsuccessful summary judgment arguments. Respondents' purported alternative ground fails *a fortiori*. A GVR is thus clearly appropriate.

As an alternative to a GVR, the Court should summarily reverse. The egregious mistakes below were not limited to the Ninth Circuit's review of the denial of summary judgment in circumstances indistinguishable from *Ortiz*. The Ninth Circuit committed distinct and reversible errors in ignoring well-established rules of forfeiture. Respondents do not dispute that they forfeited their argument for review of the denial of summary judgment by not raising it in their appellate briefs. Respondents rewrite the record in their attempt to explain away their affirmative disavowal of a jury instruction that would have interpreted the contract as a matter of law, and that attempt in any event ignores that respondents told the Ninth Circuit they were "*not* arguing" that it was error to submit the contract interpretation issue to the jury. Respondents prevailed on an argument they told the Ninth Circuit they were not making. The Ninth Circuit simply ignored all these forfeitures without even acknowledging them in its haste to overturn a jury verdict. These errors are sufficiently stark that they merit summary reversal.

A. At A Minimum, This Court Should Grant, Vacate, And Remand In Light Of *Ortiz*.

In *Ortiz*, this Court considered the question "whether a party may appeal a denial of summary judgment after a district court has conducted a full trial on the merits." *Ortiz*, slip op. at 6. The "answer is no." *Id.* at 2. The court of appeals here held the opposite almost verbatim: "We may therefore review the district court's denial of summary judgment despite full trial on the merits." Pet. App. 8a. Even respondents "admi[t]," with some understatement, that "this Court's decision in *Ortiz* has undermined" that holding. BIO 23. At a minimum, therefore, the Court should grant this petition, vacate the court of appeals' judgment, and remand for further consideration in light of *Ortiz*.

Respondents nonetheless argue that no GVR is warranted. According to respondents, the court of appeals also rested its holding that respondents' contract interpretation argument was properly before it on the purportedly independent ground "that otherwise preserved issues of law . . . may be raised on appeal from a final judgment without regard to whether a JMOL [motion] was made at trial." BIO 13. This alleged independent ground is illusory.

Throughout its opinion, the court of appeals made crystal clear what it was reviewing: the denial of summary judgment. In the introduction to its opinion, the court announced its ruling: "the district court should have granted summary judgment to [respondents]." Pet. App. 2a. The court held that respondents' failure to file a Rule 50 motion did not

matter because respondents "argued that the contract was unambiguous in [their] motion for summary judgment, and the district court denied the motion." Pet. App. 6a. Citing cases from respondents' belated Rule 28(j) letter, the Ninth Circuit then stated: "A district court's denial of summary judgment is subject to review on appeal, despite full trial on the merits, 'where the district court made an error of law that, if not made, would have required the district court to grant the motion.'" Pet. App. 6a. The court reiterated this holding as the conclusion to its reviewability discussion. Pet. App. 8a. And the court ended its opinion by declaring that "the district court erred in denying [respondents] summary judgment." Pet. App. 15a. It is therefore quite clear that the Ninth Circuit heard respondents' contract interpretation argument as an appeal of the denial of summary judgment — precisely what *Ortiz* holds is improper.[1]

Respondents' contention that the Ninth Circuit relied on a ground independent of the denial of summary judgment ultimately turns on a hopeless

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[1] To the extent respondents seek to avoid a GVR on the ground that the issue here is more "purely legal" than the issue in *Ortiz*, this Court should reject that argument as frivolous. The issue here shares the same critical feature as the issue in *Ortiz*: it cannot be decided without examining the evidence in the trial or summary judgment record. Even respondents acknowledge that the Ninth Circuit's reviewability holding rested on the conclusion that "there was no material dispute of extrinsic fact," BIO 18, and the decision below had to review the evidence before finding that respondents' view of the evidence was correct. *See* Pet. 21-23. It is Orwellian to call this a "pure question[] of law." BIO 18.

effort to distinguish between the *denial* of a motion for summary judgment and the unsuccessful legal arguments raised in the motion. Respondents point to the Ninth Circuit's statement that because respondents' argument raised an issue of law, respondents "did not have to present that argument in a motion for judgment as a matter of law. Rather, [respondents] had to raise the argument at some point before the judge submitted the case to the jury, which [they] did." Pet. App. 5a; *see* BIO 21. Respondents concede repeatedly that their argument that no JMOL motion was necessary assumes that they "otherwise preserved" their contract interpretation argument. BIO 13; *accord id.* at 10 (JMOL motion not necessary "as long as the issue was properly raised at some appropriate point before the case went to the jury"), 19 ("properly raised in the trial court"), 24 ("adequately preserved"). But respondents' concession that they were required to raise their contract interpretation argument "'at some point'" gives away the game because, in respondents' own words, the "point" at which they raised the argument was "in [their] *summary judgment motion*." BIO 21 (emphasis added).[2]

In other words, respondents' purported alternative ground independent of the denial of their

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[2] Respondents note in passing in their Statement that their trial brief "flagged" the contract interpretation issue as an issue of law that respondents "anticipated the court would decide." BIO 10 n.8. Respondents are correct not to make any argument based on this because "flagging" an issue in a trial brief but then never asking the court at trial to decide it is obviously insufficient. *See* Pet. App. 22a-25a.

summary judgment motion turns out to be the summary judgment motion itself.[3] But that argument fails *a fortiori*. The Court in *Ortiz* did not reject the appealability of the denial of an unsuccessful motion for summary judgment only to allow an appeal based on the anterior act of making the motion.[4]

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[3] Respondents' argument that objections to jury instructions or evidentiary rulings can preserve legal issues even without a separate JMOL motion, *see* BIO 19-21 & nn.12-13, is irrelevant. Respondents did not seek judgment in their favor in the court below based on arguments about jury instructions or evidentiary rulings, and respondents in any event did not object to the instruction that submitted the contract interpretation issue to the jury. *See* pp. 7-8, *infra*.

[4] The only other possible interpretation of respondents' position that the Ninth Circuit's summary judgment holding was unnecessary is that they mean to argue that *nothing* needs to be done to preserve an argument on an issue of law — not a motion for summary judgment, not a motion for JMOL, not anything else. That contention would not be serious. In what can only be studied imprecision, respondents refer repeatedly to the Ninth Circuit's *de novo* "review" of the "issue" of contract interpretation, *see* BIO 19, 21-24, as if courts of appeals "review" "issues" in the abstract, rather than decisions of lower tribunals that necessarily are tied to the record, arguments, and standards applicable at the procedural juncture in question. *See* Pet. 24-26 & n.5; *cf. Ortiz*, slip op. at 3 (explaining that immunity defense rejected at summary judgment remains available at trial, "but at that stage, the defense must be evaluated in light of the character and quality of the evidence received in court," not the "supersede[d] . . . record existing at the time of the summary judgment motion").

B. In The Alternative, The Court Should Summarily Reverse.

Respondents offer no real defense of the Ninth Circuit's inexplicable deviation from the normal rules of preservation and forfeiture. Respondents do not even attempt to argue that they sought review of the denial of their summary judgment motion in their appellate briefs. They contend only that this forfeiture was harmless because the decision below rested on the "independently sufficient argument" discussed above. BIO 25-26. But that supposed alternative ground is just as fictional when offered as an excuse for respondents' appellate forfeiture. *See* pp. 3-6, *supra*. This attempt to gin up an independent ground is a telling admission that respondents forfeited the only basis for appellate review on which the Ninth Circuit relied.

Respondents defend their declination of an instruction that would have interpreted the contract for the jury by contending that the summary judgment ruling made it futile to request such an instruction. According to the BIO, "counsel for [respondents] agreed that in light of the court's findings in the summary judgment decision . . . Instruction 25A was not applicable." BIO 26-27. It is no accident that this description does not quote the actual colloquy. It reads in full:

> The court: Is 25A not applicable?
>
> [Respondents' counsel]: Yeah, we believe 25A is not applicable.
>
> [Petitioners' counsel]: Yes, Your Honor. I think we are — it's our intention to make a motion at the close of the plaintiffs' case but — and pending

> — reserving our rights with respect to that motion, we would include it in the joint set.
>
> The court: All right. So — but we — let's just be nimble on the — on the couple that we're going to — you know, either going to delete or add on the fly so that we're ready to go.

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Respondents thus flatly declined this instruction, and their post-hoc contention that the district court's summary judgment ruling left them no choice but to decline it is belied by the record. Petitioners' own summary judgment motion had been denied too, yet petitioners understood that whether the court or the jury would interpret the contract depended on the course of events at trial. The court's express willingness to be "nimble" and consider whether to give an instruction interpreting the contract for the jury refutes the notion that it would have been futile for respondents to do anything other than agree that this instruction was not applicable. *See also* Pet. App. 24a (district court rejecting respondents' futility excuse in denying new trial). Petitioners explained this in the petition, *see* Pet. 32 n.6, and respondents' silence in response is deafening.

Moreover, respondents' revisionist history of the trial court proceedings is ultimately beside the point: respondents reiterated their disavowal of this instruction before the court of appeals by stating that they were "*not* arguing that the judgment must be reversed and the case remanded for a new trial because the District Court erroneously submitted the contract interpretation question to the jury." Resp. CA9 Reply Br. 23 (emphasis in original).

Litigants are not supposed to win cases based on what they are "*not* arguing," but that is precisely what happened here.

The explanation for this complete disregard of the normal rules of forfeiture remains a mystery. The Ninth Circuit neither acknowledged nor explained its departure from those rules. That is the very definition of arbitrariness and merits the extraordinary step of summary reversal. That disposition would vindicate not only the basic rules of litigation and the rights of petitioners, but also the proper respect for the province of the jury.

CONCLUSION

The Court should grant, vacate, and remand in light of *Ortiz*. In the alternative, this Court should summarily reverse the Ninth Circuit's judgment.

Respectfully submitted,

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